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Jonathan Askin
General Counsel

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 12, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Promotion of Competitive Networks in Local TelecommunicationsMarkets, WT Docket No. 99-217

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Secretary Salas,

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a), this letter is to provide notice of an *ex parte* meeting by Jonathan Askin and Tom Cohen of the Association for Local Telecommunications Services, Kelsi Reeves of Time Warner Telecom, David Turetsky of Teligent, Liz Lynch of NEXTLINK, Bob Primosch of the Wireless Communications Association, Derek Khlopin of TIA, and Gunnar Halley of Willkie, Farr & Gallagher in the above-referenced proceeding on Thursday, February 17, 2000. The parties met with Jeffrey Steinberg, Lauren Van Wazer, Joel Taubenblatt, and Leon Jackler of the the Wireless Telecommunications Bureau and Eloise Gore of the Cable Services Bureau. During the meeting, the parties discussed competitive access to muti-tenant buildings. The substance of the discussion is set forth in the attached documents.

Should you have any questions about this matter, please call me at 969-2597. An original and one copy of this letter is being submitted to you for inclusion in the public record.

Sincerely,

Jonathan Askin

cc: Jeffrey Steinberg, Deputy Chief, Wireless Telecommunications Bureau
Lauren Van Wazer, Wireless Telecommunications Bureau
Joel Taubenblatt, Wireless Telecommunications Bureau
Leon Jackler, Wireless Telecommunications Bureau
Eloise Gore, Cable Services Bureau

SMART BUILDINGS POLICY PROJECT

BULLET SUMMARY OF ISSUES

In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

April 11, 2000

BUILDING OWNERS ARE PREVENTING CONSUMERS FROM CHOOSING THEIR TELECOMMUNICATIONS CARRIER AND ENJOYING AFFORDABLE BROADBAND SERVICES

- ***Building owners are preventing widespread deployment of facilities-based broadband competition*:** In order to provide facilities-based service to a tenant in a multi-tenant building, a telecommunications carrier must install its facilities within the building, sometimes to the individual tenant's premises. Some landlords can and do prohibit telecommunications carrier access to their building tenants. Now that they are entering the telecommunications business themselves, building owners are preventing their tenants from taking service from competing telecommunications carriers. Still other landlords impose such unreasonable conditions and demand such high rates for access that competitive telecommunications service to their buildings is rendered uneconomic. The tenants in these buildings often are without recourse and cannot obtain access to competitive telecommunications options. It is not realistic to expect tenants to move in order to take advantage of telecommunications competition. The financial benefits of competition must exceed the substantial costs of moving locations (not to mention the inconvenience) in order for tenants to engage in such behavior. This is an unrealistic expectation and an unacceptably high price to pay for competitive sources of telecommunications services. Indeed, the 1996 Telecommunications Act includes a number portability requirement because Congress felt that changing telephone numbers was sufficiently burdensome to consumers that it could impair competition. Moving physical locations is much more expensive and inconvenient than changing telephone numbers.

- ***Foreclosing telecommunications competition in multi-tenant buildings will affect a substantial number of American individuals and businesses.*** One third of the U.S. population lives in multi-tenant buildings. There are over 750,000 commercial office buildings in this country. Where telecommunications competition is prohibited from taking hold in multi-tenant buildings, a substantial percentage of American businesses and families are harmed. They pay too much for telecom services, they lack access to dynamic, broadband capabilities, and they lack the superior service that accompanies a competitive environment. Hence, telecommunications carrier access to tenants in multi-tenant buildings is critical to realizing the benefits of telecommunications competition.

- ***The Federal government has a responsibility to ensure that all Americans can enjoy the benefits of telecommunications competition.*** The 1996 Telecommunications Act recognized a partnership between the Federal government and the States to promote telecommunications competition for the benefit of all Americans. Certain States already have recognized that providing for nondiscriminatory telecommunications carrier access to tenants in multi-tenant buildings is critical to competition but the effect of the individual State action is muted. By contrast, the Federal government has not upheld its part of this partnership. The U.S. government must stop abdicating its federal responsibility and proactively work with the States to bring broadband services and the benefits of competition to consumers in multi-tenant buildings. Federal inaction will result in the absence of competition for too many Americans.

- ***State-by-state resolution of the problem is ineffective.*** States cannot ensure nondiscriminatory access on their own. Building owners and management companies are quite large, holding or controlling multi-tenant buildings nationwide in different jurisdictions. Because these companies' holdings extend across various jurisdictions, no single State has the capacity to address the unreasonable behavior in a comprehensive fashion. In some cases, if a carrier exercises its rights under the building access laws of a particular State (e.g., in Texas), nationwide property management companies can penalize the carrier in those other States without building access laws (thereby undermining the effect of State-by-State resolution of the building access problem).

MULTI-TENANT BUILDING ACCESS AND FCC JURISDICTION

- ***Authority Over Interstate Wire and Radio Communications***: That portion of a telecommunications transmission path that is located within a multi-tenant environment ("MTE") constitutes an essential component of the transmission of interstate wire and radio communications. Moreover, the Commission's jurisdiction does not depend upon the ownership of such facilities. For example, whether inside wiring (or any portion of intra-MTE telecommunications facilities) is owned by the multi-tenant building owner or the incumbent LEC, the Commission retains authority over inside wiring issues (i.e., the demarcation point, ownership, use). This jurisdiction offers the same basis for the Commission's authority to ensure that tenants within multi-tenant environments have access to their telecommunications carrier of choice. Both concede the importance of intra-MTE facilities for the transmission of interstate wire and radio communications to and from tenants in MTEs. The jurisdictional grants under Title I and Title II apply. The pro-competitive goals of the Telecommunications Act of 1996 are highly relevant. Nevertheless, the jurisdictional inquiry must also extend to grants of authority within the Communications Act that precede the 1996 amendments.

- ***Authority Over Telecommunications Carriers***: The Commission can accomplish MTE access indirectly through its authority to regulate providers of interstate communications. Specifically, it should prohibit carriers from serving MTEs owned or operated by owners or managers that discriminate among telecommunications carriers or otherwise unreasonably restrict access by telecommunications carriers to the tenants in those MTEs. Alternatively, the Commission could prohibit carriers from entering into contracts with MTE owners or managers that provide or allow for discriminatory or unreasonable treatment of other carriers.

- ***Section 224 Authority***: In those States that have not certified to the Commission that they regulate pole attachments, the Commission could accomplish MTE access by defining rights-of-way to include all areas within and on top of MTEs to which utilities, including incumbent LECs, have the right of access. As a result, telecommunications carriers could gain access to these areas pursuant to Section 224.

- ***Section 207 Authority***: By including fixed wireless carriers within the scope of Section 207, the Commission would retain authority to ensure that MTE owners and managers do not unreasonably restrict the placement of antennas on building rooftops to serve tenants within those buildings.

- ***Section 706 Authority***: Since many telecommunications carriers, including fixed wireless providers, will offer advanced telecommunications services and capabilities, the Commission could take measures to improve MTE access pursuant to its wide-ranging Section 706 authority.

A Nondiscriminatory Telecommunications Carrier Access Requirement Is Constitutionally Sound

- With the 1996 Telecommunications Act, Congress sought to promote telecommunications competition and an increase in the availability of broadband services. Tenants in most multi-tenant buildings do not enjoy these benefits because building owners delay, deny, or place unreasonable restrictions on competitive carriers' access to their buildings. As a result, all of the competitive telecommunications industry combined has obtained access to only 5 % of the nation's 760,000 multi-tenant buildings.
- A requirement of nondiscriminatory telecommunications carrier access to multi-tenant buildings, as envisioned by HR 3487 and the FCC's *Competitive Networks* rulemaking, is fully constitutional. The Supreme Court has repeatedly held that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Even if a nondiscriminatory access requirement were considered a taking (which it is not), both HR 3487 and the FCC's rulemaking contemplate payments to building owners in exchange for access. Consequently, the just compensation requirement of the Fifth Amendment is satisfied.
- There is ample precedent to support the constitutionality of a nondiscriminatory access requirement. For example, the Eleventh Circuit recently upheld a functionally identical access provision in the Pole Attachment Act which requires utilities to provide nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. The court upheld the Act against a Fifth Amendment challenge because it requires telecommunications carriers to pay just and reasonable access rates as determined by the FCC. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331-1337 (11th Cir. 1999).
- Indeed, a nondiscriminatory access requirement very well may not amount to a taking at all. It addresses only situations in which one carrier, such as the incumbent local telephone company, already has access to a multi-tenant building. Instead of compelling the initial "physical invasion" of a telecommunications carrier that would give rise to a taking, a nondiscriminatory access requirement merely prohibits building owners from discriminating among telecommunications carriers once they have decided to allow one or more carriers to serve the building.
- In *Yee* (a case that expressly limits the holding of *Loretto*), the Supreme Court held that where a landlord had voluntarily opened its property to others, the government's regulation of the relationship between the landlord and tenants would not be deemed a taking even if the regulation restricted the landlord's ability to exclude persons from the property. *Yee v. Escondido*, 503 U.S. 519 (1992).
- On several important occasions in this country's history -- such as the public accommodation cases arising out of *Heart of Atlanta Motel* and the Civil Rights Act -- nondiscrimination requirements that allowed physical occupation were held *not* to violate constitutionally-protected property rights. Abrogation of that right to exclude others through mandated nondiscriminatory physical access once the property owner has initially consented is not a violation of the Takings Clause. Supreme Court cases establish a distinct analysis when nondiscrimination requirements are considered. A recent example includes *Thomas v. Anchorage Equal Rights Commission*, in which the Ninth Circuit noted the Supreme Court's conclusion in *Yee* that landowners do not possess a *per se* Takings Clause right to choose their incoming tenants. If a property owner has voluntarily given access to the property to any user, the Federal Government can properly regulate the characteristics of that access even to the point of requiring that all potential users be given access. The assertion that interference with the right to exclude is a *per se* taking reflects an unsophisticated reading of the controlling law and is simply wrong.
- Texas and Connecticut both have statutes that require building owners to grant telecommunications carriers nondiscriminatory access to tenants within multi-tenant buildings. Both statutes allow the landlord to collect reasonable compensation on a nondiscriminatory basis in exchange for access. Neither of these statutes has even been challenged.
- Constitutionally considered, a nondiscriminatory access requirement is hardly novel and constitutionally sound. Once it is determined that compensation will be provided to the building owner, the constitutional inquiry should be at an end. Nevertheless, as seen above, there is every reason to conclude that a nondiscrimination requirement should not be considered a taking in the first place -- even if that taking would be fully constitutional.

SCENARIOS A CLEC MAY ENCOUNTER WITH RESPECT TO IN-BUILDING WIRING AND HOW THE COMMISSION CAN ASSIST IN EACH OF THESE SCENARIOS

- ***The demarcation point is located at the MPOE and the ILEC owns the wiring***. Where the demarcation point is located at the multi-tenant building's MPOE, the *ownership* of the building's inside wiring nevertheless may remain with the ILEC. When deregulating inside wiring, the FCC initially considered ordering ILECs to relinquish all claims to ownership of inside wiring.[1] Ultimately, the FCC declined to pursue this strategy. Instead, it opted for an approach that permitted ILECs to maintain ownership of inside wiring, but prohibited that ownership from being used in a manner that would justify conduct in conflict with the FCC's goals. Specifically, where the ILEC owns the inside wiring, the FCC's rules prohibit the ILEC from imposing restrictions on the removal, replacement, rearrangement, or maintenance of inside wiring that had ever been installed or maintained under tariff.[2] In addition, the FCC held that carriers could not require customers to purchase inside wiring nor could they impose a charge for the use of such wiring.[3] Consequently, even where the demarcation point is located at the MPOE and the ILEC maintains ownership of the inside wiring, it cannot use that incident of ownership to prevent the building owner from permitting other carriers to use that wiring. The FCC should clarify that where the demarcation point is located at the MPOE, ILECs may not interfere with a building owner's right to permit other telecommunications carriers to use the multi-tenant building's inside wiring and may not demand payment for use of such wiring, even where the ILEC owns that wiring.

- ***The demarcation point is located at the MPOE and the building owner owns the wiring***. Similarly, where the demarcation point is located at the MPOE and the building owner has taken ownership of the inside wiring, as the building owner is able to do either because the building owner paid for the installation of the wiring or entered into an ownership transfer agreement with the ILEC, the ILEC cannot prohibit access to that inside wiring by a competitive

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1 Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Second Report and Order*, 51 Fed. Reg. 8498 at ¶¶ 20-24 (1986).

2 Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd 1190 at ¶ 35 (1986).

3 Id. Just because wiring is located on the non-network side of the demarcation point does not necessarily mean it is owned by the customer. Indeed, that portion of a multi-tenant building's inside wiring extending from the building's entrance facilities to the customer premises may be owned by the ILEC or the building owner, but it is not owned by the end user (who owns the inside wiring within his/her own individual apartment or office). Consequently, it bears confirmation from the Commission that the rules which prohibit ILECs from forcing end users to purchase inside wiring and which prohibit ILECs from imposing charges for the use of such wiring also prohibit ILECs from forcing the building owner to purchase the wiring or otherwise imposing use charges on the building owner, even if the building owner is not the end user customer.

telecommunications carrier as it has no claim whatsoever to the wire. Therefore, the FCC should clarify that where the building owner owns a building's inside wiring, the ILEC may not interfere with the building owner's right to permit other telecommunications carriers to use the multi-tenant building's inside wiring and may not demand payment for the use of such wiring.

- ***The demarcation point is not located at the MPOE***. Where the demarcation point is located somewhere other than the MPOE of the multi-tenant building (*e.g.*, the end user customer premises), the building's inside wiring remains a part of the ILEC's network up to the demarcation point. In this instance, the *Local Competition Third Report and Order* requires ILECs to permit telecommunications carriers unbundled access to that inside wiring as a subloop.[4] As a result, where the demarcation point is located somewhere other than the building's MPOE, the ILEC cannot prohibit use of the building's inside wiring by a telecommunications carrier because the inside wiring has been classified as a subloop UNE. The FCC should clarify that where the demarcation point is not located at a multi-tenant building's MPOE, an ILEC must permit a telecommunications carrier to lease the building's inside wire on the network side of the demarcation point as a subloop UNE. In addition, the FCC should require ILECs to provision access to the inside wire subloop in a timely unburdensome manner and to require that it be provided on an interim rate basis subject to true-up pending a determination by the States as to what final inside wire subloop rate should apply. Moreover, the FCC should clarify that where a telecommunications carrier already is using that wiring without an agreement in place with the ILEC, the ILEC may not resort to self-help (*i.e.*, tearing out the CLEC's facilities) as a means of resolving any disputes.

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4 47 C.F.R. § 51.319(a)(2)(A)("Inside wire is defined as all loop plant owned by the incumbent LEC on end-user customer-premises as far as the point of demarcation as defined in § 68.3, including the loop plant near the end-user customer premises. Carriers may access the inside wire subloop at any technically feasible point including, but not limited to, the network interface device, the minimum point of entry, the single point of interconnection, the pedestal, or the pole.").